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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000555-DG

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT

v.

On Discretionary Review from the Kentucky Court of Appeals
Case No: 2012-CA-000354-MR

LONNIE DALE RIGGS — APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE*
KENTUCKY JUSTICE ASSOCIATION

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2014, ten (10) originals of this brief were served via Federal Express upon Susan Stokley Clary, Clerk of the Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy served by regular mail upon each of the following: Samuel Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Ken Howard, Judge, Hardin Circuit Court, Division II, Hardin County Justice Center, 120 East Dixie Ave., Elizabethtown, KY 42701; Timothy R. McCarthy, Nutt Law Office, Starks Building, Suite 490, Louisville, KY 40202; David T. Klapheke, Boehl Stopher & Graves, LLP, 400 W. Market St, Suite 2300, Louisville, KY 40202.

KEVIN C. BURKE

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Appellant State Farm Mutual Automobile Insurance Company (State Farm) asks this Court to cut off an action for underinsured motorist (UIM) benefits—a statutorily-protected ***contract*** action—before the action accrues.

State Farm raises the following issue of first impression:

> Whether a two year contractual limitations clause for UIM claims that mirror the MVRA limitations period for tort claims is reasonable and enforceable.[1]

The "Suit Against Us" clause in State Farm's policy states as follows:

> There is no right of action against us [State Farm]: . . . under uninsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced not later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.[2]

Amicus Curiae the Kentucky Justice Association submits that the clause, as interpreted by State Farm, is unreasonable given the plain language of the UIM statute, KRS 304.39-320, the contractual nature of an UIM action, and the policy language itself.

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury. This case is of substantial interest to *Amicus Curiae* because State Farm seeks to cut off the rights of insureds who assert a claim for underinsured motorist (UIM) benefits—a statutorily-protected ***contract action***—before those rights accrue.

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[1] State Farm's Motion for Discretionary Review, p. 2.

[2] State Farm attached a certified copy of the policy to its motion for summary judgment which the clerk listed as stand-alone document.

State Farm's argument should be rejected for three reasons:

First, the UIM statute prohibits it. Terms and conditions in UIM policies are allowed if "***not inconsistent***" with the UIM statute. KRS 304.39-320(2)(emphasis added). The UIM statute requires a liability settlement or judgment. Only then can a UIM claimant recover "uncompensated damages" in excess of the tortfeasor's liability limits. *Id.* The very definition of "underinsured motorist" is "a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident." KRS 304.39-320(1). In 1998, the legislature amended the UIM statute to clarify that settlement with the liability insurer and the tortfeasor in an amount less than the damages also "***create[s] an underinsured motorist claim.***" KRS 304.39-320(3)(emphasis added). Here, State Farm would bar Riggs' right to UIM benefits before those rights are ever "created" (i.e. when Riggs settled with the tortfeasor)—a result at odds with the UIM statute.

Second, the vast majority of jurisdictions refuse to enforce similar provisions. Most jurisdictions hold that UIM claims, as contractual claims, accrue upon the date of breach and ignore any shorter contractual periods. *See American States Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I. 2013)(collecting cases). This is consistent with Kentucky law. *See Kentucky Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 374 (Ky. App. 2008)("Under Kentucky law, in order to recover in any action based on breach of a contract, a plaintiff must show the existence and the breach of a contractually imposed duty."). Kentucky has long recognized breach as the trigger for contractual causes of action. *See Payne v. Smith*, 7 J.J.Marsh. 500 (Ky. 1832). Even if State Farm's interpretation of the "Suit Against Us" clause is the only possible interpretation, the

clause as whole is still unreasonable because a UIM claimant suffers loss or damage upon breach, not when the underlying tort claim arises. *See Abel v. Austin*, 411 S.W.3d 728 (Ky. 2013)(a cause of action does not exist, and does not accrue, until the conduct causes injury that "produces loss or damage").Therefore, the fifteen-year limitations period generally applicable to written contracts applies. See KRS 413.090(2).

Third, the language of the policy does not support State Farm's interpretation. Unlike "bodily injury" or "loss"—terms defined and printed in bold throughout the State Farm policy—the term "injury" in the "Suit Against Us" section is ***undefined***. State Farm assumes "injury" means "bodily injury" and assigns the meaning applicable to torts in KRS 304.39-320(6). But this is a contract action, not a tort action. *See Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 801 (Ky. 2005)(collecting cases and holding that apportionment statute, KRS 411.182, does not apply to contractual UIM claims, only tort claims). The plain meaning of "injury" means any "violation of another's rights for which the law allows an action to recover damages."[3] Injury in the context of a contractual UIM action against an insurer can only mean breach. If "injury" means breach (State Farm's denial of Riggs' UIM claim after settlement), then Riggs action is timely. Riggs amended his complaint to add State Farm as a defendant before settlement with the tortfeasor and the liability insurer, before he sent the *Coots* notice to State Farm, and well before State Farm refused to pay or "breached" the contract.

A statutorily-protected UIM claim does not accrue until (1) liability settlement or judgment per the UIM statute, and (2) breach due to the UIM carrier's failure to pay an

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[3] See definition of "Injury," Merriam–Webster Dictionary Online, http://www.merriam-webster.com/dictionary (last viewed August 25, 2014); see also BLACK'S LAW DICTIONARY, p. 789 (7th ed. 1999) defining "injury" as "the violation of another's legal right, for which the law allows a remedy."

amount in excess of the settlement or judgment. State Farm's proposed interpretation, if allowed, would significantly dilute the statutory and contractual rights all UIM beneficiaries in the Commonwealth. Moreover, it would affect, not just policyholders, but also UIM "insureds of the second class" who are entitled to benefits under a UIM policy but are not parties to the UIM contract. *See James v. James*, 25 S.W.3d 110 (Ky. 2000)(describing UIM insureds of the second class). According to State Farm's interpretation, an UIM action could expire before it ever accrues, and would bar claims of insureds who are not even parties to the contract. Such considerations far outweigh any vague concerns of delay and prejudice to the insurer.

For all these reasons, *Amicus Curiae* submits that the Court of Appeals reached the right result, however this Court can and should affirm the Court of Appeals for slightly broader reasons to guide insurers and insureds alike. *See Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co.*, 434 S.W.3d 489, 496 (Ky. 2014)(Court may affirm a lower court for any reason even reasons not raised by the parties).

ARGUMENT

I. THE ISSUE PRESENTED BY STATE FARM IS ONE OF FIRST IMPRESSION FOR THIS COURT

Three published opinions have interpreted contractual limitation periods in either Kentucky uninsured (UM) or UIM policies: two Kentucky appellate opinions involving UM policies, *see Elkins v. Kentucky Farm Bureau Mut. Ins. Co*, 844 S.W.2d 423 (Ky. App. 1992);*Gordon v. Kentucky Farm Bureau Ins. Co.*, 914 S.W.2d 331 (Ky.1995), and one federal district court opinion predicting Kentucky law in the context of a UIM policy, *see Brown v. State Auto*, 189 F.Supp.2d 665 (W.D.Ky 2001). In all, the courts held the

contractual periods were ***unenforceable*** and applied the fifteen-year limitations period applicable to written contracts. See KRS 413.090(2).

State Farm relies on an unpublished opinion from the Sixth Circuit purporting to apply Kentucky law. *See Pike v. Government Employees Insurance Company*, 174 Fed. Appx. 311 (6th Cir. 2006). However, the "Suit Against Us" clause in *Pike* differs materially from State Farm's policy. In *Pike*, GEICO tied the contractual limitations period to the time for filing a "personal injury" claim. State Farm did not track GEICO's language—State Farm uses the broader term "injury" which, as alluded to already, can mean breach of contract in the context of a contractual UIM action against State Farm. Moreover, neither the parties in *Pike* nor the federal courts examined the language of the UIM statute, the contractual nature of UIM, or whether a cause of action for UIM accrues upon breach. And this Court is not bound by a federal court's interpretation of Kentucky law anyway. *See LKS Pizza, Inc. v. Com. ex rel. Rudolph*, 169 S.W.3d 46, 49 (Ky.App.2005). State Farm also relies on an unpublished Kentucky Court of Appeals opinion. *See Perry v. Kelty*, No. 2011– CA–000160–MR, 2012 WL 1556311 (Ky. App. May 4, 2012). But the issue in *Perry* was whether the insured received an amendatory endorsement, not whether the contractual limitations period was reasonable.

State Farm looks to opinions involving homeowners or fire policies. See Appellant's brief, pp. 3-5. But those cases were not decided in the context of remedial legislation. Those cases did not involve the KMVRA, and, more specifically, did not involve the UIM statute. State Farm also looks to cases from three states: Iowa, Illinois, and Ohio, states with materially different UIM statutes, and states that take the *minority* position with regard to the issue before Court. See Appellant's brief, pp. 14-16.

State Farm does not cite Kentucky's UIM statute anywhere in its brief. As the issue before the Court is an issue of first impression, it is worth examining the UIM statutory language first.

II. THE UNDERINSURED MOTORIST STATUTE, KRS 304.39-320, REQUIRES A LIABILITY SETTLEMENT OR JUDGMENT TO "CREATE" AN UNDERINSURED MOTORIST CLAIM

The UIM statute, KRS 304.39-320, was originally enacted in 1974 as part of the Kentucky Motor Vehicle Reparations Act ("KMVRA"). UIM is optional to purchase, but an "automobile insurer is required by statute to provide such coverage: the underinsured motorist coverage if the insured requests it, the no-fault coverage unless the insured rejects it, and minimum limits tort liability coverage with no option." *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993).

The UIM statute is remedial legislation. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 457 (Ky.1997). The UIM statute works with the no-fault and liability sections of the KMVRA and furthers a primary purpose of the KMVRA: "[t]o reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system." *Coots*, 853 S.W.2d at 898, *quoting* KRS 304.39-010(5).

Importantly, the UIM statute only allows reasonable contractual terms and conditions if "***not inconsistent***" with the UIM statute. KRS 304.39-320(2)(emphasis added).). Indeed, "'provisions required by [the UIM] statute are treated as being a part of the policy the same as if expressly written there.'" *Philadelphia Indem. Ins. Co. v. Morris*, 990 S.W.2d 621, 626 (Ky. 1999). In *Philadelphia Indem. Ins. Co. v. Morris*, this

Court struck down a contractual setoff provision in a UIM policy at odds with the 1988 amendments to the UIM statute. The Court found the contractual provision to violate the statutory language and was therefore against public policy. *Id.*

The UIM statute requires a settlement or judgment against the tortfeasor before the UIM claimant recover "uncompensated damages" in excess of the liability limits. See KRS 304.39-320(2). An underinsured motorist is defined as "a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident." KRS 304.39-320(1). Under the statute, the "UIM carrier's liability is measured by the liability of the tortfeasor." *G & J Pepsi–Cola Bottlers, Inc. v. Fletcher*, 229 S.W.3d 915, 918 (Ky.App.2007*); see also Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 315 (Ky.2006) ("The tortfeasor's liability insurance is the primary coverage, and the UIM insurance is the secondary or excess coverage[.]"). Likewise, when the legislature amended the UIM statute in 1998, it clarified that settlement with the liability insurer and the tortfeasor in an amount less than the damages "***create[s] an underinsured motorist claim.***" KRS 304.39-320(3)(emphasis added).

Contrary to Kentucky's UIM statute, State Farm seeks to "create" an UIM action tied to the KMVRA tort limitations period instead of the date of the liability settlement or judgment. The trial court agreed with State Farm, and held that Riggs' right to recover UIM benefits was barred before Riggs settled with the tortfeasor—a result plainly at odds with KRS 304.39-320(3). Apart from the statutory language, State Farm's interpretation is inconsistent with the remedial purposes of the UIM statute and the overall goal of the KMVRA to "reduce the need to resort to bargaining and litigation." Indeed, State Farm's

interpretation thwarts recovery of UIM benefits and requires insureds to preemptively sue UIM carriers well before they obtain a settlement or judgment from the tortfeasor.

Kentucky's UIM statute also distinguishes the extra-jurisdictional cases State Farm relies on. See Appellant's brief, pp. 14-16. None of those states have UIM statutes contained within comprehensive remedial legislation like the KMVRA. None of the statutes have language similar to KRS 304.39-320. And none of the statutes expressly preclude setoff of liability proceeds so UIM is not truly "excess" over liability coverage. See Iowa Code Ann. §516A.1; Ohio Rev. Code Ann. §3937.18; 215 ILCS §5/143a-2.

The "Suit Against Us" section of the State Farm policy is unreasonable in light of KRS 304.39-320. The fifteen-year limitations period generally applicable to written contracts applies instead. KRS 413.090(2).

III. CONSISTENT WITH KENTUCKY LAW, THE MAJORITY OF JURISDICTIONS HOLD THAT UIM CLAIMS RUN FROM THE DATE OF BREACH AND REFUSE TO ENFORCE SHORTER CONTRACTUAL PERIODS

An underinsured motorist action, although statutorily created and protected, is still a contract action. *See Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 801 (Ky. 2005). Kentucky, like most other states, holds that a contract action accrues upon breach of contract. *See Hoskins' Adm'r v. Kentucky Ridge Coal Co.*, 305 S.W.2d 308, 311 (Ky.1957) ("Usually an action accrues at the time of infliction of a wrong or breach of a contract."); *Kentucky Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 374 (Ky. App. 2008)("Under Kentucky law, in order to recover in any action based on breach of a contract, a plaintiff must show the existence and the breach of a contractually imposed duty."). Indeed, Kentucky has recognized breach as the trigger for accrual of a contract action for nearly two-hundred years. *See Payne v. Smith*, 7 J.J.Marsh. 500

(1832). Because a statute of limitation "does not begin to run against the plaintiff until his cause of action accrues" see *Chatterson v. City of Louisville*, 145 Ky. 485, 140 S.W. 647, 648 (Ky.1911), a different rule should not apply to contractual limitation periods.

Like Kentucky, most other jurisdictions hold that UIM claims, as contractual claims, accrue upon breach. Likewise, most jurisdictions hold that policy limitation periods tying accrual to the date of accident or some event other than breach are unenforceable. *See American States Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I.2013)(collecting cases: *Blutreich v. Liberty Mutual Insurance Co.*, 170 Ariz. 541, 826 P.2d 1167, 1168 (Ct.App.1991); *Shelter Mutual Insurance Co. v. Nash*, 357 Ark. 581, 184 S.W.3d 425, 430 (2004); *Spear v. California State Automobile Association*, 2 Cal.4th 1035, 9 Cal.Rptr.2d 381, 831 P.2d 821, 825 (1992); *Allstate Insurance Co. v. Spinelli*, 443 A.2d 1286, 1292 (Del.1982); *Hamm v. Allied Mutual Insurance Co.*, 612 N.W.2d 775, 784–85 (Iowa 2000); *Eidemiller v. State Farm Mutual Automobile Insurance Co.*, 22 Kan.App.2d 278, 915 P.2d 161, 168–69 (1996); *Palmero v. Aetna Casualty & Surety Co.*, 606 A.2d 797, 798–99 (Me.1992); *Lane v. Nationwide Mutual Insurance Co.*, 321 Md. 165, 582 A.2d 501, 506–07 (1990); *Berkshire Mutual Insurance Co. v. Burbank*, 422 Mass. 659, 664 N.E.2d 1188, 1189 (1996); *Jacobs v. Detroit Automobile Inter–Insurance Exchange*, 107 Mich.App. 424, 309 N.W.2d 627, 629–30 (1981); *Snyder v. Case*, 259 Neb. 621, 611 N.W.2d 409, 416 (2000); *State Farm Mutual Automobile Insurance Co. v. Fitts*, 120 Nev. 707, 99 P.3d 1160, 1162 (2004); *Metropolitan Property & Liability Insurance Co. v. Walker*, 136 N.H. 594, 620 A.2d 1020, 1022 (1993); *Brooks v. State Farm Insurance Co.*, 141 N.M. 322, 154 P.3d 697, 700 (Ct.App.2007); *Wille v. Geico Casualty Co.*, 2 P.3d 888, 892 (Okla.2000); *Vega v.*

Farmers Insurance Co. of Oregon, 323 Or. 291, 918 P.2d 95, 97–98 (1996); *Alvarez v. American General Fire and Casualty Co.*, 757 S.W.2d 156, 158 (Tex.Ct.App.1988); *Safeco Insurance Co. v. Barcom*, 112 Wash.2d 575, 773 P.2d 56, 60 (1989); *Plumley v. May*, 189 W.Va. 734, 434 S.E.2d 406, 411 (1993).

Here, even if State Farm's interpretation of the "Suit Against Us" clause is the only possible interpretation, the clause is still unreasonable because the UIM claimant suffers contractual loss or damage only upon breach—not when the underlying tort claim arises. By analogy, it would be absurd to tie the accrual date of a legal malpractice action to the underlying "case within the case" as the action would expire well before the claimant realizes damages for malpractice. *See Abel v. Austin*, 411 S.W.3d 728 (Ky. 2013)(a legal malpractice cause of action does not exist, and does not accrue, until the conduct causes injury that "produces loss or damage"). A different rule should not apply just because the unreasonably limitation appears in a contract of adhesion. *See Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 801–02 (Ky.1991)(labeling standard for insurance policies as contracts of adhesion).

Consistent with Kentucky law, and the majority of jurisdictions to consider the precise issue, State Farm's interpretation of the "Suit Against Us" provision is unreasonable and unenforceable, and the fifteen-year limitations period generally applicable to written contracts should apply. See KRS 413.090(2).

IV. STATE FARM'S "SUIT AGAINST US" PROVISION CAN BE INTERPRETED TO MEAN THE LIMITATIONS PERIOD ACCRUES UPON BREACH OF CONTRACT—THEREFORE RIGGS' UIM CLAIM IS TIMELY

"The words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning." *Nationwide Mut. Ins. Co. v. Nolan*, 10 S.W.3d

129, 131 (Ky. 1999). As to the manner of construction of insurance policies, exclusions, like the policy limitation provision, are to be narrowly interpreted and all questions resolved in favor of the insured. *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 227 (Ky. 1994). Since the policy is drafted in all details by the insurance company, the insurer must be held strictly accountable for the language used. *Id.*

"[A]n ambiguous policy is to be construed against the drafter, and so as to effectuate the policy of indemnity." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007)(citations omitted). Furthermore, "ambiguous language must be liberally construed so as to resolve all doubts in favor of the insured." *Id.* A corollary to the rule is the doctrine of reasonable expectations. The doctrine provides that only a "plain and clear manifestation of the company's intent to exclude coverage" will defeat the insured's reasonable expectation of coverage under the policy. *Simon v. Continental Ins. Co.*, 724 S.W.2d 210, 212 (Ky.1986).

Here the "Suit Against Us" clause in State Farm's policy states as follows:

> There is no right of action against us [State Farm]: . . . under uninsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced not later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

The Court will note that, unlike "bodily injury" or "loss"—terms defined and printed in bold throughout the State Farm policy—the term "injury" is ***undefined***. The Court will also note that State Farm ***did not*** track the language in *Pike v. Government Employees Insurance Company, supra.* State Farm nonetheless assumes "injury" means "bodily injury" or "personal injury" and assigns the meaning applicable to torts in KRS 304.39-

320(6).

But, again, this is a contract action, not a tort action. *See Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, *supra*. The plain meaning of "injury" means any "violation of another's rights for which the law allows an action to recover damages."[4] Breach of contract clearly fits within the definition. And breach as "injury" makes the most sense. Riggs' claim is against the other party to the contract, State Farm, not the tortfeasor. What other "injury" could State Farm inflict upon Riggs under the facts? At a minimum, the term "injury" is ambiguous and Riggs is entitled to a construction of the term in his favor consistent with the doctrine of reasonable expectations.

"Injury" as breach of contract is consistent with the remainder of the policy. Under the policy, a UIM claim ripens or accrues when State Farm disagrees as to either the applicability of UIM coverage or the amount of damages that the insured suffered. See State Farm Policy, "Deciding Fault and Amount-Uninsured Motor Vehicle-Coverage U and Underinsured Motor Vehicle-Coverage W, p. 21. Therefore, State Farm must first deny a claim based on either the existence or amount of coverage available before the insured has a right to file a UIM claim against it. Only then does the breach of contract claim accrue under the policy.

If "injury" means breach (i.e. State Farm's denial of Riggs' UIM claim after settlement), then Riggs' UIM claim is timely. Riggs amended his complaint to add State

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[4] See definition of "Injury," Merriam–Webster Dictionary Online, http://www.merriam-webster.com/dictionary (last viewed August 25, 2014). This Court looks to ordinary dictionary definitions for plain meaning, including the Merriam-Webster Dictionary Online. *See Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 58 (Ky. 2011)(utilizing the Merriam-Webster Dictionary Online). Interestingly, even the technical, legal definition of "injury" is "the violation of another's legal right, for which the law allows a remedy." BLACK'S LAW DICTIONARY, p. 789 (7th ed. 1999).

Farm as a defendant ***before*** he settled with the tortfeasor and the liability insurer, ***before*** he sent the *Coots* notice to State Farm, and well ***before*** State Farm refused to pay or "breached" its contract with Riggs. Riggs' UIM action against State Farm is therefore timely as within the two-year period established by State Farm.

V. STATE FARM'S REASONS FOR ENFORCING THE CONTRACTUAL LIMITATION PERIOD ARE UNAVAILING.

State Farm offers several policy reasons why the Court should allow a shortened contractual limitations period tied to the underlying tort claim. As an initial matter, the UIM statute, KRS 304.39-320, is the applicable "public policy" here. A court cannot invalidate a statute even it disagrees with the public policy embodied in it. *Commonwealth, ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992). Therefore, State Farm's policy arguments should be disregarded entirely. State Farm's remedy, if any, lies in the legislature.

State Farm's arguments also lack merit. State Farm claims that "applying the fifteen-year contract statute of limitations would likely result in duplicative litigation and a waste of party and judicial resources." Appellant's brief, p. 13. State Farm makes the same arguments the insurer made in *American States Ins. Co. v. LaFlam*, *supra*. The Supreme Court of Rhode Island dismissed those arguments, noting "[w]e are hard-pressed to envision a scenario in which an insured who is in need of benefits and who has a viable UM/UIM claim ... would delay asserting the claim and remain less than fully compensated any longer than necessary." *LaFlam*, 69 A.3d at 842. The insured already has an incentive to join the UIM carrier in action with the tortfeasor as early as possible assuming the damages are known to exceed the tortfeasor's liability limits. In any event,

nothing prevents the UIM carrier from intervening in such an action to avoid any potential "prejudice."

On the other hand, the prejudice to insureds by the contract limitations period would be irreparable. Insureds must therefore file suit against any and all UIM carriers within the MVRA tort limitations, even if insured does not know—and cannot find out pre-suit—the underlying liability policy limits. This adds additional cost, additional counsel, additional scheduling problems for discovery depositions, mediation, settlement, and the like. State Farm responds with an "easy" solution: pre-suit tolling agreements. However, tolling agreements are not as easily to obtain as State Farm suggests. As a practical matter, several different UIM policies may apply, all written by different companies, so the injury victim would need to seek an agreement from each insurer. Most insurance carriers assign claims adjusters to pre-litigation matters, not attorneys, and tolling agreements can take weeks, if not months, to make their way up through the ranks. Even then, there is no guarantee the insurer will agree to tolling. In any event, an injury victim should not have to jump through time-wasting hoops to satisfy the unreasonable whims of insurers through one-sided and oppressive policy terms.

State Farm also fails to mention that not all UIM insureds are policyholders and have access to the policy. UIM coverage also extends to "insureds of the second class," individuals who may be entitled to benefits under a UIM policy but are not named insureds or parties to the contract. *See James v. James*, 25 S.W.3d 110 (Ky. 2000)(describing UIM insureds of the second class). According to State Farm's interpretation, a UIM action could expire before it ever accrues, and the "Suit Against Us" clause would bar claims of insureds who are not even parties to the contract and have

no access to the policy itself. These considerations, as well the irreparable and permanent harm such provisions cause to accident victims, greatly outweigh any vague concerns of delay and prejudice advanced by State Farm.

CONCLUSION

A statutorily-protected UIM claim does not accrue until (1) liability settlement or judgment per the UIM statute, and (2) breach due to the UIM carrier's failure to pay an amount in excess of the settlement or judgment.

State Farm's interpretation of its "Suit Against Us" clause dilutes the statutory and contractual rights all UIM beneficiaries in the Commonwealth because it ties the limitation period to actions in tort. State Farm's interpretation is unreasonable and unenforceable given the plain language of the UIM statute, the contractual nature of an UIM action, and the policy language itself.

The Opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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